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No. 08-531

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MISSOURI PUBLIC SERVICE COMMISSION; JEFF DAVIS; CONNIE MURRAY; ROBERT M. CLAYTON III; TERRY JARRETT; KEVIN GUNN, in their official capacities as Commissioners of the Missouri Public Service Commission and not as individuals,
Petitioners,

v.

SOUTHWESTERN BELL TELEPHONE, L.P., doing business as SBC Missouri,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM L. MAGNESS *
CASEY, GENTZ & MAGNESS, L.L.P.
98 San Jacinto Blvd., Suite 1400
Austin, Texas 78701
(512) 480-9900

* Counsel of Record

Attorney for Respondents

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Does a State commission have authority under federal law to implement and enforce Federal Communications Commission ("FCC") rules and orders governing unbundling under Section 251(c)(3) of the Telecommunications Act of 1996 ("the Act") when arbitrating an interconnection agreement under Section 252(b)(1) of the Act if those rules and orders require an incumbent local exchange carrier and Bell Operating Company to permit a requesting carrier to commingle wholesale services obtained pursuant to Section 271(b)(2)(B) with leased unbundled network elements, or has the Eighth Circuit ruled that such authority does not exist?

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rule 29.6, Respondents, all nongovernmental corporate parties to this proceeding, state as follows:

Respondent NuVox Communications of Missouri, Inc., a Delaware corporation, is a wholly-owned subsidiary of Gabriel Communications Finance Company, a Delaware corporation, which is a wholly-owned subsidiary of NuVox, Inc., a Delaware corporation. NuVox, Inc. is a privately held Delaware corporation and has no parent corporation. No publicly held company owns 10% or more of NuVox, Inc.

Respondent Socket Telecom, LLC, is a wholly-owned subsidiary of Socket Holdings Corporation. There is no public company that is a 10% or greater shareholder of Socket Holdings Corporation.

Respondent XO Communications Services, Inc. is a wholly-owned subsidiary of XO Communications, LLC, which is a wholly-owned subsidiary of XO Holdings, Inc., a publicly held Delaware corporation. No publicly held company owns 10% or more of XO Holdings, Inc.

Respondents Xspedius Management Co. of Kansas City, LLC and Xspedius Management Co. Switched Services, LLC, have been consolidated into a single entity named tw telecom of kansas city llc. The company, tw telecom of kansas city llc, is a wholly-owned subsidiary of tw telecom holdings, inc., which is a wholly-owned subsidiary of tw telecom inc., a publicly held corporation. No publicly held corporation owns 10% or more of tw telecom inc.'s stock.

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47 U.S.C. § 252 ..... *passim*

47 U.S.C. § 271 ..... *passim*

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Until the 1990s, local phone service was considered a natural monopoly. States typically granted an exclusive franchise in each local service area to a single local exchange carrier which owned all of the facilities necessary to provide local service, including local loops (wires connecting telephones to switches), the switches (equipment directing calls to their des-

tinations), and the transport (wires carrying calls between switches). *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 371 (1999). With the passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in the scattered sections of 47 U.S.C.) (the "Act"), Congress fundamentally restructured the competitive opportunities in the local telecommunications markets. *Id.*

In order to promote competition in the provision of local telephone services, Congress expanded the federal role over local telecommunications. *Id.* at 371-372. Authority to set national standards concerning certain market-opening requirements of the Act was conferred on the Federal Communications Commission ("FCC"), but the Act simultaneously provided that the States, and not the FCC (unless a State fails to act), would arbitrate and approve interconnection agreements between the former monopoly telephone companies and competitors. 47 U.S.C. §§ 251, 252; *Iowa Utils. Bd.*, 525 U.S. at 372.

Two distinct portions of the Act establish the rights and obligations of the former monopoly telephone companies and their competitors. Section 251 imposes a series of affirmative duties upon *all* incumbent local exchange carriers ("ILECs"); Section 271 imposes a separate set of obligations on *only* the ILECs that are former Bell Operating Companies ("BOCs"), including Southwestern Bell Telephone, L.P., d/b/a SBC Missouri ("SBC"),[1] that were divested from AT&T in the consent decree entered in the antitrust

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[1] Subsequent to the filing of its appeal in the Federal District Court, SBC merged with AT&T Corporation, and is now doing business as AT&T Missouri. For consistency with the record below, however, Respondents use the name "SBC" throughout this Brief in Opposition.

suit brought by the U. S. Department of Justice.[2] These Section 271 obligations were imposed by Congress as a condition of removing the MFJ's ban prohibiting the BOCs from providing long distance services. The obligations include enumerated "competitive checklist" items the BOCs must provide to competitive local exchange carriers ("CLECs") to ensure that the market for local services is irreversibly open to competition.

While Congress specified in Section 271 which parts of the telephone network BOCs must make available to competitors, it left to the FCC under Section 251 the task of determining which unbundled network elements ("UNEs") *all* ILECs must make available to CLECs. Congress directed the FCC to consider, at a minimum, whether "access to such network elements as are proprietary in nature is necessary" to the competing carrier and whether "the failure to provide access to such network elements would impair the ability of" the competing carrier to offer its services. 47 U.S.C. § 251(d)(2). This "necessary and impair" standard delineates the limits of any ILEC's obligations to offer to competitors access to network elements on an unbundled basis at cost-based rates pursuant to Section 251 requirements. *Iowa Utils. Bd.*, 525 U.S. at 391-392.

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[2] District Judge Harold Greene approved the consent decree between the government and AT&T in the form of a Modified Final Judgment ("MFJ") entered in 1982. *See United States v. Am. Tel. & Tel. Co.*, 552 F.Supp. 131 (D.D.C. 1982), aff'd *sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). When the MFJ was entered, there were seven (7) "Baby Bells." Mergers between and among the BOCs and other companies have left only three (SBC [which has inherited the "AT&T" name], Qwest, and Verizon).

The task of defining which elements are "necessary" and what constitutes "impairment" under Section 251 has been the subject of numerous FCC rulemaking decisions, appeals and remands since the FCC's first unbundling order was released in 1996.[3] Originally, the network elements the FCC ordered must be unbundled under Section 251 was substantially the same as the "checklist items" Congress required the BOCs to make available under Section 271. App. 6a.[4] Over time, however, the list of elements found to satisfy the "necessary and impair" standard has changed and shrunk, with the result that fewer elements are required to be available as UNEs under Section 251 than Congress required be made available by the BOCs in Section 271. *Id.*

The FCC expressly ruled in its *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 F.C.C.R. 16978, 17387 (2003) (*"TRO"*), that even when Section 251 no longer requires the ILECs to provide their competitors with UNEs based on a finding of "impairment," there nonetheless exists for the BOCs a separate obligation to provide access to the checklist items under Section 271. The FCC also concluded that the difference in obligations imposed by Sections 271 and 251 lies in both scope (application only to the BOCs rather than all ILECs) and the appropriate pricing standard ("just and

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[3] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 F.C.C.R. 15499 (1996).

[4] The abbreviation "App." refers to the Appendix to the Petition for Certiorari.

reasonable" rates versus "just and reasonable rates" that are also "cost-based").[5] *Id.*

It was against this background that on March 30, 2005, SBC filed its Petition for Arbitration with the Missouri Public Service Commission ("MPSC") pursuant to Section 252 of the Act to arbitrate issues unresolved in the negotiation of interconnection agreements between SBC and various CLECs, including the Coalition Respondents. App. 86a-87a.[6] A central issue in the arbitration was whether, as Coalition Respondents contended, the MPSC's authority under Section 252 of the Act included authority to require SBC to provide to CLECs as part of their interconnection agreements local loops, local transport, and local switching elements that are required under Section 271, but not under Section 251, at rates the MPSC determined are "just and reasonable" rates. App. 166a-171a. Following a hearing and the submission of briefs, the Arbitrators issued their rulings on the unresolved issues, including rulings consistent with Coalition Respondents' position regarding the scope of State commission authority under Section 252. *Id.*

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[5] The FCC's ruling establishing that Section 271 unbundling obligations are independent of and in addition to Section 251 obligations was affirmed by the D.C. Circuit in *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 589 (D.C. Cir. 2004).

[6] NuVox Communications of Missouri, Inc., Socket Telecom, LLC, XO Communications Services, Inc., Xspedius Management Co. of Kansas City, LLC, and Xspedius Management Co. Switched Services, LLC, were parties to the MPSC proceeding as members of the "CLEC Coalition." (Big River Telephone Company, LLC also was a member but is no longer participating as a member and does not join in this Brief in Opposition.) This group was referred to collectively as the "Coalition Defendants" below, and are referred to collectively herein as the "Coalition Respondents."

The MPSC thereafter issued its Arbitration Order in which it approved the Arbitrators' rulings on this central issue. App. 93a.

SBC appealed portions of the MPSC's Arbitration Order to the federal District Court. In particular, SBC challenged the MPSC's ruling that under its Section 252 arbitration authority it can require SBC to provide to CLECs as part of their interconnection agreements local loops, local transport, and local switching elements that are required under Section 271, but not under Section 251, of the Act at rates the MPSC determined are "just and reasonable" rates. *See generally* App. 14a-82a. On September 14, 2006, the District Court ruled that the MPSC had exceeded its jurisdiction as to these decisions; on appeal, the Eighth Circuit affirmed.

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Split.

The Eighth Circuit's ruling is not contrary to or inconsistent with the Eleventh Circuit's decision in *NuVox Communications, Inc. v. BellSouth Communications, Inc.*, 530 F.3d 1330 (11th Cir. 2008). The issue on which the Eighth Circuit was asked to rule and did rule concerned the scope of State commission authority under Section 252 of the Act to arbitrate a BOC's provision of the checklist items contained in Section 271. Specifically, the issue presented was whether the MPSC could require SBC to provide to CLECs through arbitrated interconnection agreements local loops, local transport and local switching that are checklist items under Section 271 at rates the MPSC determined were "just and reasonable." The Eighth Circuit found that State commissions

have no authority to interpret or enforce the obligations of Section 271, holding that the FCC has exclusive jurisdiction over BOC compliance with the requirements of Section 271.

The MPSC is wrong in asserting that the Eighth Circuit's ruling is in conflict with the Eleventh Circuit's holding in *NuVox*. As the MPSC correctly States, the Eleventh Circuit concluded that the Florida Public Service Commission had properly determined that BellSouth must commingle wholesale services, including checklist items, with UNEs under the FCC's rulings in its *TRO* and in its Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 F.C.C.R. 2533 (2005) ("*TRRO*"). The Eleventh Circuit's holding is expressly based upon 47 C.F.R. § 51.309(e) which requires ILECs to perform the tasks necessary to permit CLECs to commingle UNEs with wholesale services obtained from an ILEC, and upon FCC orders ruling that the checklist items of Section 271 are wholesale services. *NuVox*, 530 F.3d at 1333-1334.

The focus of Rule 51.309(e) and the FCC's statements on commingling in its *TRO* and *TRRO* is on CLECs' rights regarding UNEs; that is, what CLECs can do with UNEs under Section 251. A review of the FCC's various unbundling decisions reveals that in implementing Section 251 the FCC not only has identified the network elements that must be made available as UNEs, but also directed how they may be obtained and used, how they will be priced, and the extent to which the ILECs are obligated to assist in providing them. For example, the FCC ruled that the ILECs must perform the function of combining

UNEs, a decision that was upheld in *Verizon Communications, Inc. v. FCC,* 535 U.S. 467 (2002).

It is the FCC's determination regarding CLECs' rights and ILECs' obligations with respect to UNEs under Section 251 that was being implemented by the Florida Commission. The fact that the particular obligation being arbitrated involved CLECs' right to commingle UNEs with wholesale services that happened also to be Section 271 checklist items did not render the Eleventh Circuit's holding a ruling on State commission authority to arbitrate – to implement and enforce – the requirements of Section 271.

There is no conflict between the Eighth Circuit's ruling and the Eleventh Circuit's ruling.

II. The Eighth Circuit's Opinion Will Not Have the Far-Reaching Effect the Missouri Commission Claims.

In its Petition, the MPSC contends that the conflict between the Eighth Circuit and Eleventh Circuit decisions must be resolved to avoid undermining Congress's plan for dual State/federal responsibilities for implementing the Act. The MPSC is mistaken in reading the Eighth Circuit's ruling as preventing State commissions from addressing ILEC obligations to offer Section 271 checklist items with UNEs in arbitration proceedings. Where the FCC in implementing Section 251 of the Act has ruled that CLECs' right to obtain and use UNEs includes a right to commingle or otherwise use them with Section 271 checklist items, a State commission has the necessary authority, as part of its express authority under Section 252 to implement and enforce the requirements of Section 251, to ensure that interconnection agreements comply with the FCC's rules and orders

adopted under Section 251. Nothing in the Eighth Circuit's ruling alters or diminishes State commission authority in this regard. In a future arbitration proceeding, a State commission can require an ILEC that is a BOC to comply with all of the FCC's rules and orders governing unbundling under Section 251, including those that direct commingling of UNEs and wholesale services obtained under Section 271, without violating the Eighth Circuit's holding.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM L. MAGNESS *
CASEY, GENTZ & MAGNESS, L.L.P.
98 San Jacinto Blvd., Suite 1400
Austin, Texas 78701
(512) 480-9900

* Counsel of Record

Attorney for Respondents

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